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# Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
*Petitioners,*
v.
UNITED AIR LINES, INC.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

### SUMMARY OF ARGUMENT

The Tenth Circuit held that the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, generally has no application to individuals (such as the plaintiffs here) who are able to function normally in their daily lives through the use of ameliorative mechanisms (such as, here, eyeglasses) or medications, even where an employer relies on that individual's underlying, uncorrected, disabling medical condition (here, seriously impaired eyesight) as the reason why the individual is not suitable for hire. The ADA defines "disability" to include "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual," as well as "(B) a record of such an impairment" and "(C) being regarded as having such an impairment." 42 U.S.C. § 12102. While the parties, and the Tenth Circuit, have concentrated on subsections (A) and (C) in determining whether the ADA applies to circumstances such as those in this case, it is our submission that subsection (B), the "record of impairment" definition, applies to these circumstances more straightforwardly and with less complexity of analysis and factual development than do the other definitional subsections.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

1. Unlike other civil rights statutes, the ADA does not set our inflexible prohibitions but, instead, establishes parameters for making employment decisions so that the employer reasonably considers and takes into account any employee disability. In this case, for example, the ADA if it applied would require United to consider and justify its uncorrected vision rule in light of evidence indicating whether the risk that impaired uncorrected eyesight could hamper a pilot with normal corected vision in exigent situations is realistic and, if so, whether there are any prophylactic measures that would eliminate that risk.

The answer to those questions are surely not self-evident, although it is certainly possible that United would be able to establish that, given the extremely high safety standards to which it quite properly aspires, the rule is a proper one under the ADA.

United's position in this case, however, is that Congress in the ADA exempted its uncorrected vision rule entirely from the self-scrutiny that the statute requires. That position, if excepted, would of course exempt from the ADA not only standards such as United, as to which one can perceive a logic if there is evidence to support it and no acceptable reasonable accommodation, but, as well, entirely arbitrary, facially irrational exclusions of normally-functioning individuals with underlying, albeit medically controlled, disabling conditions.

2. The "record of impairment" aspect of the ADA's definition of "disability" is directly applicable here.

(a) There is, we believe, no dispute in this case at this juncture as to whether or not the plaintiffs have an "impairment." The Tenth Circuit so held, recognizing that this aspect of the "disability" definition is directed at consideration on a biological level of the state of the individual's physiological systems. And, that understanding of the "impairment" prong of the definition was con-



firmed by this Court last year in *Bragdon v. Abbott,* 118 S. Ct. 2196, 2202-04 (1998).

(b) The language of the "record of impairment" definition applies here. Individuals who have a medically-diagnosed impairment and who then obtain medical care or advice that results in the prescription of devices, medications, or lifestyle changes to control that impairment ordinarily have a "record of" that impairment in their medical files, and it is ordinarily easily possible, as it is here, to determine whether that impairment is one that necessarily substantially limits a major life activity absent medical intervention.

(c) The Equal Employment Opportunity Commission's (EEOC's) understanding of this "record of impairment" provision confirms that it is applicable to circumstances such as those in this case. The administrative materials confirm, for example, that medical records are among the types of records that suffice; that the subsection applies to present, controlled as well as historical, cured impairments; that the subsection applies whether or not the individual is currently substantially limited in a major life activity; and that the record itself need not show that there was in fact a substantial interference with major life activities, if the impairment is one that necessarily would limit such activities.

(d) Finally, a comparison of the controlled impairment situation presented here with the circumstances and analysis of the only case in this Court applying a "record of impairment" "disability" definition (under a parallel statute), *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), demonstrates that the "record of impairment" subsection does apply. *Arline* held that an individual with a history of hospitalizations for tuberculosis had a "record of" a substantially limiting impair-

ment, so that her discharge for fear of further contagion was subject to scrutiny under the Rehabilitation Act of 1973.

Both in *Arline* and in circumstances such as those in this case, the individual has at present no functional substantially limiting impairment because of an earlier medical intervention. In both instances, however, the individual has a real, not imagined, history of serious medical impairment, objectively documented, and the employer is relying on that history as the basis for making its employment decision. And, in both instances, the employer's concern is that an apparently cured, dormant or controlled medical situation will reoccur on the job due to failure of the controls or cure, interfering with the employee's work in a significant way.

As *Arline* makes clear, the "record of impairment" definitional provision is intended precisely to subject these medically-driven decisions to the Act's structured inquiry requirements, assuring individuals with such a "record of impairment" that they will not be driven from the workplace on the basis of unexamined assumptions about the possible manifestation in the workplace of a medical impairment that is otherwise controlled or cured.



## ARGUMENT

This case arises under the employment title of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, which, broadly speaking, prohibits employer discrimination against persons with disabilities in hiring, assignment, and the like.

The plaintiffs are qualified, licensed commercial pilots who have 20/20 eyesight with their medically prescribed corrective lenses but 20/200 and 20/400 uncorrected eyesight—eyesight so poor that they could not, without corrective lenses, drive a car, watch television, or engage in a myriad of other daily activities.

The defendant is United Airlines, which rejected plaintiffs for employment by reason of its rule that only otherwise qualified individuals with *uncorrected* eyesight of 20/100 or better can be United passenger plane pilots.

United thus distinguishes for employment purposes between pilots with 20/100 eyesight, hiring only those who meet that eyesight test without any medical correction and rejecting those who meet it with a medical correction and whose natural eyesight is impaired.

From this bare bones summary one would think that the question here is the *substantive* ADA question of whether United Airlines can make such a distinction between two pilot applicants, both of whom by hypothesis meet United's eyesight requirement for pilots in operational terms—*viz.*, both of whom test 20/100 in a test of actually operational eyesight—on the express basis that one applicant has an underlying physical impairment.

According to the court of appeals one would be wrong in so thinking. Indeed, according to that court there is *no* such ADA substantive question. That is, said the court of appeals, because the ADA at the *threshold* only protects "individual[s] with a disability" (42 U.S.C. § 12112(a)), and a person whose eyesight is corrected to 20/100 or better is *not* a person with a disability. Thus,

according to the court below, any adverse employment action against such a person expressly based on the person's uncorrected eyesight—even though such eyesight is admittedly a disabling condition unless corrected—is adverse employment action against a person without a disability and is entirely outside the ADA's purview.

Put more generally, on the decision below, the ADA has *no application whatever* to individuals who are able to function normally in their daily lives through the use of ameliorative mechanisms or medications, even where—as here—the employer *relies precisely on that individual's underlying, uncorrected, disabling medical condition* as the reason why the individual is not suitable for hire. In other words, the Tenth Circuit held, and United is arguing in this Court, that Congress meant in a broad range of circumstances to entirely exempt employer decisionmaking concerning whether a particular underlying medical condition should preclude an individual from holding a job from ADA challenges and scrutiny.

It is our submission in this brief that the ADA's coverage is not unnaturally confined so as to put that entire class of cases beyond substantive scrutiny. In more specific terms, we argue here that where the employer's decisionmaking process turns on the proposition that it is the prospective employees' actual, known, recorded, physical condition that is the critical, disqualifying factor precluding their employment Congress specifically provided for coverage under the Act in the subsection of the definition of "disability," which states that "disability" means *"a record of"* a "physical or mental impairment that substantially limits one or more . . . major life activities,"—a subsection of the ADA "disability" definition section that has been heretofore ignored, as far as we are aware, in this litigation.[2]

[2] The narrow focus of this brief is not intended to suggest any disagreement with the positions of the plaintiffs or the United States regarding the application of the two other subsections of the "disability" definition. Rather, we seek to avoid repetition of arguments ably made by others and to present for the Court's consideration what we believe is a most straight forward approach to the issue here, and one unlikely to be otherwise presented. In so doing, we note that our showing that this case is brought within the ADA by § 12102(2)(B) does not mean that it is not as well, brought within the ADA by either or both of the two subsections relied upon by plaintiffs and the United States, § 12102(2)(A) and (C).



So that we are not misunderstood, before turning to our submission we hasten to add that a proper reading of § 12102(B) will not determine whether or not United Airlines' eyesight requirement for pilots is valid or not. Rather, an affirmative answer to the threshold coverage question will only trigger the application of the ADA to the particular situation here. And, that statute, like its predecessor, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, is "carefully structured" so as not to *preclude* employment decisions based upon pertinent medical conditions but rather to require employer decisionmaking regarding the impact of employee medical conditions on their ability to perform job tasks "based on reasoned and medically sound judgments" rather than on "reflexive reactions to actual and perceived handicaps." *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).[3]

We recognize that it is this Court's "practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which [the Court] granted certiorari." *Bragdon v. Abbott*, 118 S. Ct. 2195, 2205 (1998). Nonetheless, that practice is not invariable (*see, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989); *Batson v. Kentucky*, 479 U.S. 79, 84-85 n.4 (1986)) and should not, we would suggest, be applied to preclude a decision on the basis of one of three aspects of a single, integrated definition. And be that as it may, it appears to us to be beyond doubt that it would be useful for the Court to have before it the full panoply of posible applications of the ADA's "disability" definition to this case in considering the question whether the plaintiffs are "disabled" and therefore covered by the Act.

[3] *Arline*, as indicated, was decided under § 504 of the Rehabilitation Act of 1973. The ADA's employment provisions were

To put matters in perspective we begin by considering the role of the definition of "disability" in the ADA's employment provisions as a whole. After providing that background, we go on to demonstrate that while the complex drafting of the ADA as a whole, and of the "disability" definition in particular, can be said to make the first and third subsections of the "disability" definition somewhat ambiguous with regard to medical conditions that are for almost all purposes controlled through medication or medical devices, the language, function, and purposes of the "record of impairment" portion of the definition shows that the subsection straightforwardly encompasses a known medical condition documented in an individual's medical records that would necessarily "substantially limit[] one or more of the major life activities" of the individual absent correction or amelioration.

1. *Statutory Structure*: The ADA defines "disability" for all its purposes, including for the purpose of Title I of the Act, "Employment," as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment. [42 U.S.C. § 12102(2)].

Section 12111(8), in turn, defines a "qualified individual with a disability" for purposes of the ADA employment provisions as "an individual with a disability who,

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closely modeled on those of the Rehabilitation Act, and the ADA directs that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). For that reason, constructions of the Rehabilitation Act are routinely relied upon in ADA cases. *See Bragdon v. Abbott, supra*, 118 S. Ct. at 2202, 2205, 2207-08.



with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," and specifies that in determining what job functions are "essential," "consideration shall be given to the employer's judgment" as well as to a written job description used in advertising or interviewing for the job.

The Act goes on to proscribe discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112 (a) and (b). "Discriminate" is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5). "Undue hardship" in its turn means "an action requiring significant difficulty or expense, when considered in light of a list of many factors, including the cost of the accommodation, the financial resources of the employer, the number of employees, and the composition of the workforce. 42 U.S.C. § 12111(10). Finally, the ADA provides that an employer may establish safety requirements that screen out individuals with disabilities if that requirement eliminates or limits a "direct threat" to the health and/or safety of others, where "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §§ 12111(3), 12113(b).

As this short summary indicates, "the ADA rules simply establish parameters to guide employers in how to consider, and take into account, the disabling condition involved." U.S. Equal Employment Opportunity Commission and U.S. Department of Justice, *Americans with Disabilities Act Handbook* (1991), at I-1. The Act does so by posing a series of filtering inquiries that rely heavily on "relative standards instead of categorical prohibitions"

(Note, *Toward Reasonable Equity: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 Harv. L. Rev. 1560, 1575 n.104 (1998)), and that are designed to provide a " 'reasonableness' focus" (*id.* at 1572) to the employer's decisionmaking process concerning whether an individual with particular physical or mental attributes can perform a particular job.

More specifically, and using the circumstances of this case as illustrative, assuming for the moment that the plaintiffs have a "disability" and are covered by the statute, United Airlines would first determine whether they are "qualified" employees for the pilot job they seek. Since plaintiffs have all the requisite skills and license requirements, that inquiry would in all probability focus upon United's apparent safety-based concern, embodied in its 20/100 uncorrected vision requirement, that the corrective measures—glasses or contact lenses—could fail at critical moments, leaving the pilot to read instruments and judge conditions in the air and on the ground with impaired vision.

United would begin quite properly, that the safe operation of the airplane, even in emergency situations, is as a general matter an "essential function" of piloting a plane. *Cf. Western Air Lines v. Criswell,* 472 U.S. 400, 418 (1985) (discussing the Federal Aviation Administration's rigorous, safety-based requirements for pilots, including mandatory retirement at age 60). Applying the "essential functions," "reasonable accommodation," and "direct threat "statutory provisions, United would then go on to examine self-critically the additional, more specific assumptions underlying its uncorrected vision rule—*viz.*, that there *is* an unacceptable risk that the corrective lenses of pilots whose uncorrected vision is worse than 20/100 will fail at critical junctures and thereby endanger the passengers and others.

That inquiry might include such considerations as evidence concerning how often, and with what consequences,



the feared failures of corrective lenses have in fact occurred (as to which data should be available because individuals with better than 20/100 uncorrected vision do wear corrective lenses); whether there is any record of accidents or near-accidents due to failed corrective lenses for commercial pilots (such as plaintiffs) who have seriously impaired uncorrected vision but who do fly commuter, cargo, and other planes; whether substitute requirements such as multiple sets of replacement glasses placed in predetermined places in the cockpit would suffice to eliminate that risk; and so on.

The answers to these questions and others like them are not self-evident, and depend upon medical and aviation expertise, data, and careful analysis. And, the ADA does not purport to provide inflexible or unequivocal answers. Rather, the ADA poses these questions for the employer in the first instance and directs that the employer's answers be reviewed in court, if necessary, on a case-by-case, context-specific basis.

United Airline's position in this case is that none of the foregoing is of any legal pertinence. According to United as long as applicants for employment as pilots have normal vision when corrected and therefore are not impeded for most purposes in their daily lives by their severe biological vision impairment, Congress did not intend to require that United engage *at all* in the mode of inquiry outlined above when determining that that severe impairment is a disqualification for employment as a pilot.

To exaggerate that position for illustrative purposes (for we recognize that the actual rule United imposes may prove defensible when scrutinized as the ADA requires), on United's understanding of the statute, a law firm could similarly require specified uncorrected vision as a medical requirement for attorney positions, and the firm in so doing would be wholly outside the ADA's purview.

Yet, unlike an airline with respect to pilot positions, a law firm could not, in all probability, without demonstrating an undue hardship, demand a specified level of *corrected* vision under the ADA for any and all attorney positions, given the availability of readers, computer technology, and other accommodations that make it possible for vision impaired lawyers and judges to perform, and to perform at a high level.

While it is difficult in that light to see what the justification for a law firm *uncorrected* vision rule could be, the very heart of United's position is that Congress did *not* require in the ADA that employers have *any* justification for disadvantaging an individual on the basis of that individual's actual, biological, serious medical impairment, if that impairment is medically corrected to allow normal functioning as a general matter. That position rests on a serious misreading of the ADA's "disability" definition.

2. *The "Record of Impairment" Definition of "Disability"*: The basis for the employer's insistence that Congress had this anomalous intention in enacting the ADA, and for the Tenth Circuit's holding, succinctly stated, is that (1) individuals in plaintiffs' situation are not "disabled" under the § 12102(2)(A) definition because a physical impairment that is corrected to normal for almost any purpose one can imagine does not "*substantially* limit[] one or more of the major life activities of such person" (emphasis supplied); and (2) such individuals are not "being regarded as having such an impairment" because the only "major life activity" implicated by United's uncorrected vision rule is "working" (*see* 29 C.F.C. § 1630.2(i)), and that rule does not suggest that United "regarded" plaintiffs, because of their uncorrected vision, as unqualified for "all pilot positions at all airlines." *Sutton v. United Air Lines*, 130 F.3d 893, 905 (10th Cir. 1997).

We are somewhat perplexed as to why the litigants in the courts below, and the lower courts, viewed this case



through the inherent complexities of subsections (A) and (C) of the "disability" definition section, when, as we now detail, subsection (B) of that definition section, stating that a "disability" is also "a record of" an impairment of the kind defined as a disability in subsection (A)—*viz.*, an impairment that substantially limits a major life activity—both in its plain language and in its underlying purpose brings this case within the ADA's coverage.[4]

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[4] It suffices here to note that subsection (A) raises thorny legal interpretation questions explored at length in the decision below and the parties' submissions. And, as we develop below, a literal reading of the "regarded as impaired" subsection and the applicable negotiations raises conceptual difficulties of some dimension.

Without discussing those difficulties fully, we note that the language of the "regarded as" provision suggests an inquiry into the employer's perceptions and frame of mind. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(1) (interpretive guidance construing the "regarded as" provision as pertaining, *inter alia*, to circumstances in which "[t]he individual [has] . . . an impairment which is not substantially limiting [of a major life activity] but *is perceived* by the employer . . . as constituting a substantially limiting impairment") (emphasis supplied). Yet, as the interpretive guidance just quoted indicates, that language can also be read to incorporate on the perceptual level the *whole* of the "substantially limit" provision of § 12102(2)(A), thereby necessitating an understanding of what the employer *thought* about the employee's or prospective employee's overall work prospects, and not only what the employer thought about the prospective employee's suitability for employment by that particular employer or what the employee's *actual* work prospects were given the *actual* employment practices of other employees. *See E.B. Black, Ltd. v. Marshall*, 407 F. Supp. 1088, 1099-1101 (1980) (opinion treating as an original proposition with the interpretive difficulties posed under the parallel language of the Rehabilitation Act of 1973 with regard to determining the range of jobs for which an employer "regards" an employee as disqualified and whether that range of jobs is sufficiently broad to demonstrate that the employer "regards" the employee as disabled from the major life activity of working).

As we noted at the outset (n.2, *supra*), we in no way disagree with the plaintiffs' position concerning the application of the "regarded as" provision to this case. Our point is simply that the application of that provision entails certain complexities, both analytically and factually, and that in a broad range of cases those

(a) At the outset, we do not understand there to be any dispute in this case at present as to whether the plaintiffs' have "a physical or mental impairment." The Tenth Circuit recognized that they do, because "[i]f the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated [in 29 C.F.R. § 1630(h)] body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures." *Sutton v. United Air Lines, supra*, 130 F.3d at 898-99. This analysis of what constitutes an "impairment" was later confirmed by this Court in *Bragdon v. Abbott, supra. See* 118 S. Ct. at 2202-04 (concluding that asymptomatic HIV infection is an "impairment" because of the detrimental biological changes caused by the infection, and considering the functional impact of those biological effects only with regard to the separate inquiry whether the "impairment" affects a major life activity).

(b) On a purely linguistic level, individuals who have a medically-diagnosed impairment and who then obtain medical care or advice that results in the prescription of devices, medications, or lifestyle changes (or more than one of those forms of intervention) that mitigate the functional effects of that impairment necessarily have a "record of" that impairment in their medical files. That "record" will ordinarily be sufficient to determine whether or not the recorded untreated impairment is one that "substantially limits one or more of the major life activities" (§ 12102(2)(A)) of the individual. From the medical records of an epileptic or a diabetic, for example, one would be able to determine whether the impairment at the biological level is one that, left untreated, would have a substantial negative effect on the patent's daily life activities—as vision impairment of the kind suffered by the plaintiffs here surely would.

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complexities do not arise under the "record of impairment" definition of disability.



(c) The Equal Employment Opportunity Commission (EEOC)'s regulations and interpretive guidance confirm the applicability of the "record of impairment" subsection of the ADA disability definition to situations, such as this one, where the employer is relying upon a known, actual—but ordinarily controlled—substantially limiting impairment as the basis for disadvantaging an individual.

The pertinent EEOC regulation reads in its entirety:

> *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. [29 C.F.R. § 1630.2(k) (emphasis added).]

The pertinent EEOC interpretive guidance adds:

> The second part of the definition [of disability] provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that *erroneous classification.* [cites to legislative history]
>
> *This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.* There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. [29

C.F.R. Part 1630, App. § 1630(k) (emphasis added).][5]

Finally, the EEOC's Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act (1992) provides further guidance, including the following:

> This part of the definition protects people who have a history of a disability from discrimination, whether or not they currently are substantially limited in a major life activity.
>
> *For example*: It protects people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, *controlled* or in remission. . . . [*Id.* at II-8 (emphasis added).]

The EEOC administrative materials, then, taken together, confirm that the "record of impairment" aspect of the statutory "disability" definition applies here.

These analyses, first, make explicit the seemingly self-evident proposition that the record relied upon can include medical records.

Further, the EEOC's understanding of the statute is that a relevant record need not indicate any *current* actual or perceived substantial limitation on a major life activity, and may document *either* a history of an impairment *or* a present impairment. According to the enforcing agency, 'this part of the definition is satisfied if a record relied on by an employer indicates that the individual *has or has had* a substantially limiting impair-

[5] There is one additional paragraph in the EEOC's Interpretive Guidance that discusses the relevance of records concerning eligibility for veteran's, retirement, or other benefits; that paragraph is not here pertinent.

The administrative materials quoted in the text closely track the available ADA legislative history, and we do not believe that that history adds anything of interpretive utility. For completeness, however, we set out the pertinent language of the committee reports in the Appendix to this brief.



ment." 29 C.F.R. Part 1630, App. § 1630(k); *see also id.* (explaining that an individual currently misclassified in records is covered).

Additionally, the EEOC construes the "record" subsection, consistently with its language, as providing that the record itself need not reflect that the individual has in fact suffered a substantial effect on major life activities. Thus, an entirely *erroneous* record of an impairment suffices (such as an erroneous record that an individual has a learning disability), as does a record of an impairment that "*would* substantially limit one or more of the individual's major life activities" (29 C.F.R. Part 1630 App. § 1630(k), emphasis supplied).[6]

[6] One can, in any event, quite sensibly characterize an individual with a controlled impairment that would be substantially limiting if uncontrolled as having a history of a substantial limitation. For it is almost surely true that the individual suffered the impairment uncorrected for at least some period in the past; children usually obtain corrective lenses, for example, only after they cannot read the blackboard or it otherwise becomes evident to them that they are having vision problems in their daily lives.

And, in any event, no reason appears why Congress would distinguish between situations in which an individual's underlying, potentially substantially limiting impairment is diagnosed and recorded before rather than after suffering the debilitation that the impairment is capable of causing if left uncontrolled. There would be no basis, for example, for treating differently for purposes of the "record of impairment" definition an individual diagnosed with diabetes on the basis of blood tests, before suffering a diabetic coma or any other debilitating symptoms, and one for whom the diagnosis was made only after she suffered such symptoms. The two individuals' later underlying conditions, after medical and diabetic interventions, and their medical diagnoses in their medical records could well be identical. Employers, moreover, could well have as much basis in the one case as in the other to consider the individual's medical history in deciding on their suitability for a job. To require that such consideration be subjected to the careful self-scrutiny required by the ADA in the one instance and not in the other makes no sense, and there is no evidence that Congress intended any such senseless result.

Similarly, the repeated reference in the administrative materials and in the legislative history (*see* Appendix) to bringing individ-

And, the EEOC specifically construes the "record" subsection to cover "controlled" illnesses or impairments, indicating once more that the underlying impairment can be continuing, and that it is the usual untreated impact of the recorded impairment on major life activities, not the current functioning of the individual, that matters.

(d) Finally, the purposes served by the "record of impairment" aspect of the statutory definition of "disability," as those purposes are described and implemented in the only case of this Court addressing the issue, *School Board of Nassau County v. Arline, supra,* pushes toward the conclusion that that subsection provides for ADA coverage where employers rely on known, potentially debilitating, demonstrable biological conditions, even if those conditions have no significant present effect on an individual's usual daily activities.

*Arline* concerned a teacher who had been diagnosed with tuberculosis and hospitalized with the disease three times in the recent past. 480 U.S. at 276, 281. The Court held that these facts established that the plaintiff had a "record of . . . impairment" within the meaning of the definitional provision of the Rehabilitation Act that is identical to the "record of impairment" provision of the ADA, and that, since she therefore had a "disability," she was covered by the Act. *Id.* at 281.

In explaining its conclusion, the Court briefly described the reasons for amending the Rehabilitation Act in 1974 to include both the "record or impairment" and

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uals with a history of cancer within the ADA through the "record of impairment" language gives no indication that Congress was distinguishing between cancers that had already caused substantial impairment (usually because of the treatment, such as surgery or chemotherapy, not because of the cancer itself) and those equally serious cancers (such as melanomas) that may be treatable in the first instance through forms of surgery that do not impair the patient's functioning even temporarily.



"regarded as impaired" prongs of the "disability" definition:

> The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974), U.S. Code Cong. & Admin. News 1974, p. 6400. To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] *may at present have no actual incapacity at all.*" *Id.* [480 U.S. at 279 (emphasis added).]

A comparison of the problem presented by employer reliance on past episodes of a disabling illness as the basis for disadvantaging an individual with "no actual incapacity at all," as in *Arline,* and that presented by similar employer reliance on a recorded, continuing, substantially limiting medical condition that, because it is controlled by medicine or medical devices, also creates at present "no actual incapacity at all" confirms two points: first, there is no functional difference of significance between the two types of reliance on an individual's medical records; and second, both present identical issues of policy regarding the appropriate employer treatment of employee medical conditions.

In both instances, the individual has a real, not imagined, history of serious medical impairment, objectively documented, and the *employer is relying on that history, and on information contained in those documents, in making its employment decision.* That the two situations are similar in every relevant regard explains why the

statute does not distinguish between the two but encompasses both in the "record of impairment" definition.[7]

It is also relevant that the situations are distinct—and distinct in the same way— for purposes of appropriate employer decisionmaking processes from the situation in which an employer is simply mistaken about the medical facts concerning the individual. In the latter situation, the Act endeavors only to prohibit employers from acting upon misperceptions concerning individual employee's actual medical circumstances. In the former situations, the policy questions to be addressed are considerably more complex.

In particular, in both the *Arline* kind of case and in this kind of case, the employer's concern is that an apparently dormant or controlled medical condition is capable of becoming active or that the controls are capable of failing while the individual is at work, with the result that the underlying impairment could interfere in some important way with the employee's ability to do her work. In *Arline* the concern was that the individual was not cured and remained contagious; in the case of an individual with a history of heart disease, the concern may well be that there remains an underlying heart condition that will cause a heart attack at a critical moment; in the case of an individual with controlled diabetes or epilepsy, the concern is likely to be that the controls are

[7] In the line of cases of which *Arline* is a paradigm, the individual may or may not have a continuing underlying biological condition; *viz.*, the plaintiff in *Arline* could have a latent tuberculosis infection—which is apparently what the employer feared—or could in fact finally have been permanently cured. The very point of this Court's holding in the cases, is that it does not matter for purposes of the "record of impairment" definition of disability which is the case; rather, bringing that circumstances within the ADA serves to require the employer to ascertain the true medical facts and their significance. Thus, *Arline* confirms that the "record of impairment" provision is *not* limited to past, cured medical conditions.



not perfect, and that the individual will have an epileptic seizure or diabetic reaction despite the medication; and in the present, impaired vision circumstances, the concern, similarly, is that the correction will fail, in this instance through broken, clouded over, or displaced lenses and affect the pilot's ability to cope with an exigent circumstance—*e.g.*, a difficult landing.

In all these situations, the employer's concerns may or may not prove justified when subjected to careful self-scrutiny and, if necessary, to judicial scrutiny. And in all these situations, the relevant factors in undertaking that scrutiny involve consideration of both the medical evidence and of the particular job in question, to determine whether the individual's underlying medical situation could in fact come to the fore on the job and undermine the individual's ability to carry out the job's essential functions.

As *Arline* makes clear, a central thrust of the Rehabilitation Act was to "require[] employers to respond rationally" to individuals with medical records demonstrating a substantially limiting medical condition, by undertaking a prescribed, structured consideration of the pertinent facts and considerations. 480 U.S. at 286 n.15. Similarly, a primary purpose of the ADA, as we have seen (*see* part 1, *supra*), is setting standards for how potentially relevant medical information should be evaluated in determining whether the individual is "otherwise qualified" for the position sought. The "record of impairment" portion of the disability definition furthers that purpose identically both in the *Arline* past medical incidents circumstance and in the present, controlled impairment situation.

In contrast, the statutory interpretation urged by United and adopted by the Tenth Circuit would, with no apparent justification, recognize the ADA's requirement of reasoned, evidenced-based decisionmaking for individuals such as the plaintiff in *Arline*, who may or may not have a continuing impairment but in the past suffered a substantially limit-

ing impairment, but would negate that requirement and permit totally arbitrary reliance on known, serious, current, potentially disabling impairments if the impairment is seemingly under present control and therefore not disabling in the individual's present daily life.[8]

In sum, the "record of impairment" aspect of the ADA's "disability" definition, in its language, administrative interpretation, and avowed purpose, was intended precisely to bring within the ADA employer decision-making based upon the fear that underlying medical or physical impairments documented in an individual's medical records and substantially impairing unless controlled or cured will not remain cured or corrected but will return to affect the individual's ability to perform the job in question.[9] The plaintiffs here therefore had a "record"

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[8] We note once again (see n.2, *supra*) that ADA coverage here should also obtain by reason of the "regarded as impaired" provision, albeit, as we have also noted, through a more circuitous interpretive path.

For example, the "regarded as impaired" analysis appears to turn not upon whether the underlying physical or mental impairment is substantially limiting if untreated but upon whether a sufficiently broad group of job opportunities are precluded, or rather perceived by the employer to be precluded, by the impairment *as controlled*. Thus, by reason of the "regarded as impaired" subsection, an individual denied a job because of controlled diabetes may or may not demand that the employer consider her suitability for employment under the sequential reasoning and evidence-gathering process prescribed by the ADA, depending upon the seemingly irrelevant consideration whether the employer understands the employee to be precluded from a broad or a narrow range of jobs in the labor market. Yet, the actual medical circumstances remain constant, and it is difficult to imagine why Congress would treat the two situations differently or demand complex evidentiary showings regarding employer perceptions about the labor market, as the entry price for triggering the ADA's protections. The "record of impairment" subsection makes no such distinction, and therefore provides more certainty of similar result in conceptually similar cases.

[9] With limited knowledge, it is not plain to us whether the "record of impairment" subsection is pertinent to the other case



of a substantially limiting disability, and are covered by the ADA. As such, they are, like the plaintiff in *Arline* and for similar reasons, entitled to "the opportunity to have their condition evaluated in light of the medical evidence and a determination made as to whether they were 'otherwise qualified'," rather than being "vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent." *Arline*, 480 U.S. at 286.

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relating to a controlled medical condition on which this Court has granted certiorari, *Murphy v. United Parcel Service*, No. 97-1992.

In *Murphy*, the employer's preclusionary standard is based *not* on Mr. Murphy's *uncorrected* medical condition—high blood pressure so serious that the patient could not live unless it was under control—but on Mr. Murphy's blood pressure readings *after partial medical correction*. Whether the "record of impairment" section should apply to that situation is less clear than it is here.

On the one hand, in both instances, the individual in fact has a record of *an* impairment that is undeniably substantially limiting. On the other hand, in *Murphy* the employer's exclusionary standard was not based on the recorded, uncorrected impairment, but on the plaintiff's actual, controlled medical condition.

As such, *Murphy* is similar to a situation in which an individual has an impairment that is substantially limiting but that the employer does not treat as disqualifying or is willing to accommodate, and has additionally another impairment that the employer does treat as disqualifying and as to which there is a dispute whether it is substantially limiting. A lawyer restricted to a wheelchair who also has controlled diabetes would be an example; if the employer denies the lawyer a position because of the diabetes but employs several lawyers who use wheelchairs, we doubt that the fact that the individual has *a* disability (inability to walk) answers the question whether the ADA applies to the employer's diabetes preclusion. In that situation, that is, the conclusion that the lawyer is an individual with a disability by reason of his inability to walk, without more, would not appear to trigger ADA coverage where the employer action concerns a *separate* physical or mental impairment.

We are in no way suggesting that the plaintiff in *Murphy* does not come within subsections (A) or (C) of the "disability" definition, but only that it is much less clear than it is here that subsection (B) applies.

## CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX
## OF
## ADA LEGISLATIVE HISTORY OF "RECORD OF IMPAIRMENT" "DISABILITY" DEFINITION, 42 U.S.C. § 12102(2)(B)

(1) The second prong of the definition of the term "disability" includes an individual who has a record of such an impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded. [Senate Comm. on Labor and Human Resources, S. Rep No. 116, 101st Cong, 1st Sess, at 21, 23 (1989).]

(2) The second prong of the definition of the term "disability" includes an individual who has a record of such impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment

would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded. [House Comm. on Education and Labor, HR Rep No. 485(II), 101st Cong, 2d Sess, at 50, 52-53 (1990).]

(3) Test B. A record of such an impairment.

This test is intended to cover those who have a record of an impairment. This includes a person who has a history of an impairment that substantially limited a major life activity, such as those who have recovered from an impairment. It also includes persons who have been misclassified as having an impairment. Examples include a person who had, but no longer has, cancer, or a person who was misclassified as being mentally retarded. [House Comm. on the Judiciary, HR Rep No. 485(III), 101st Cong, 2d Sess, at 27, 29 (1990).]